

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 98,

Respondent,

and

Case 04-CC-223346

SHREE SAI SIDDHI SPRUCE, LLC, d/b/a
FAIRFIELD INN & SUITES BY MARRIOTT,

Charging Party.

**RESPONDENT IBEW LOCAL 98'S RESPONSE TO CHARGING PARTY'S
OPPOSITION TO THE MOTION OF THE ACTING GENERAL COUNSEL TO
THE NATIONAL LABOR RELATIONS BOARD TO REMAND THE
COMPLAINT TO THE REGIONAL DIRECTOR FOR DISMISSAL OR,
ALTERNATIVELY, TO DISMISS THE COMPLAINT**

Respondent, International Brotherhood of Electrical Workers, Local 98 ("Local 98" or "Union"), submits this response to the Opposition by Charging Party, Shree Sai Siddhi Spruce, LLC d/b/a Fairfield Inn & Suites By Marriot ("Charging Party" or "Fairfield Inn"), to the Acting General Counsel's Motion to remand the Complaint to the Regional Director for dismissal or, in the alternative, to dismiss the Complaint ("Motion").

I. PROCEDURAL HISTORY AND FACTUAL STATEMENT

On November 18, 2018, the Director of Region Four issued a Complaint in this matter which alleged that Local 98 violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act by its use of inflatable rats and a bullhorn near the entrances to the Fairfield Inn and the Libertine Restaurant ("Libertine") in Philadelphia, Pennsylvania. On May 28, 2019, after a hearing, Chief Administrative Law Judge Robert A. Giannasi ("ALJ") issued a decision in which he

recommended dismissal of that portion of the Complaint which alleged violations of the Act based on the use of inflatable rats. He found a violation of the Act for the Union's use of a bullhorn for three hours on June 29, 2018. *International Brotherhood of Electrical Workers, Local 98 (Fairfield Inn)*, JD-45-19 (May 28, 2019).

On July 16, 2019, then-General Counsel Peter Robb and the Charging Party filed Exceptions to the ALJ's dismissal of that portion of the Complaint which related to the inflatable rats. On August 20, 2019, the Union timely filed Cross-Exceptions to portions of the ALJ's decision regarding his finding that the Union's quite limited use of a bullhorn was a violation of Section 8(b)(4)(ii)(B). These Exceptions and Cross Exceptions are pending before the National Labor Relations Board.

On February 4, 2020, Acting General Counsel Peter Ohr filed a Motion with the Board to remand the Complaint to the Regional Director for dismissal, or, in the alternative, for the Board to dismiss the Complaint. Acting General Counsel Ohr argued that he disagrees with then-General Counsel Robb's position that the Board should reverse the ALJ to find that the Union's use of inflatable rats violated Section 8(b)(4)(ii)(B) and overrule *Carpenters Local 1506 (Eliason & Knuth of Arizona)*, 355 NLRB 797 (2010), and *Sheet Metal Workers Local 15 (Brandon Medical Center) (Brandon II)*, 356 NLRB 1290 (2011). Acting General Counsel Ohr further specified that it is his position that the Union's conduct here "is lawful under the Board's holdings in *Eliason* and *Brandon II* and the reasoning of every federal court to consider the issue." (Motion, page 2, citations omitted). The Motion also stated that the Acting General Counsel believes that the Union's use of bullhorn to convey an area standards message for a three-hour period on a single day did not rise to the level of unlawful secondary coercion in violation of Section 8(b)(4)(ii)(B). (Motion, footnote 3.)

On February 18, 2021, the Charging Party filed a Response in Opposition to the Acting General Counsel's Motion ("CP Opposition"). This brief is filed in response and opposition thereto.

II. LEGAL ARGUMENT

1. The Acting General Counsel's Motion is well-grounded in the controlling law.

For the reasons set forth in its briefs in support of its Cross-Exceptions and in Opposition to the Exceptions of the General Counsel and the Charging Party, it is the Union's position that the Acting General Counsel's Motion is well-reasoned and based on the controlling law and, as such, should be granted. For the sake of judicial economy, those arguments from the Union's briefs are incorporated herein.

2. The Charging Party's arguments that the Board has the exclusive authority to abandon a claim and that the Acting GC is misusing his prosecutorial discretion misunderstands the pending Motion.

The Charging Party first argues that only the Board has the discretion to abandon a claim and that the General Counsel does not have such authority. This argument fails to understand that the Acting General Counsel made a *motion* to the Board to exercise its discretion, he did not take any action on his own. The Charging Party also argues here that the Acting General Counsel did not address his reasons for not proceeding through the adjudication. This is simply incorrect. The Acting General Counsel is perfectly clear in his Motion that his predecessor's Exceptions on the ALJ's determination are out of step with the controlling caselaw, as was the ALJ's determination that the Union's limited use of a bullhorn violated Section 8(b)(4)(ii)(B). The caselaw on this

point is perfectly clear, especially given that it was the former General Counsel's position that the controlling cases should be overruled. (Motion, pages 2-3.)

3. The Charging Party's argument that the Acting General Counsel lacks statutory authority to request dismissal of the case is simply wrong.

The Charging Party's second argument is that President Biden did not have the authority to remove Mr. Robb under Article II of the Constitution. The Charging Party reasons that Mr. Robb's "unconstitutional termination led to the unconstitutional appointment of the Acting General Counsel" and so the Acting General Counsel lacks authority to take action, including the current motion. (CP Opposition, page 14) The Charging Party's argument is wholly without merit.

The plain language of Sections 3(a) and 3(d) the National Labor Relations Act makes clear that President Biden had the authority to remove Mr. Robb from the office of the General Counsel. Section 3(a) of the Act applies to the members of the Board and provides those Board members with protections from removal insofar as it states that: "[a]ny member of the Board may be removed by the President, upon notice of hearing, for neglect of duty or malfeasance in office, but for no other cause." 29 U.S.C. §153(a). In contrast, Section 3(d), which applies to the position of the General Counsel, sets a term of four years but does not provide the General Counsel with the tenure protection granted to members of Board. That Act gives the General Counsel a four-year term means only that—the language does not silently also bestow protection from removal by the President. It is well-established that a statute which states a term of years for an office does not implicitly provide a limitation on the President's authority to remove. *Parsons v. United States*, 167 U.S. 324, 342 (1897).

Moreover, and obviously, Congress could have provided the same tenure protection to the General Counsel as it provided to the Board members, but it chose not to do so. “[W]here Congress includes particular language in one section of the statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.” *Russello v. U.S.*, 464 U.S. 16, 23 (1983) (citations omitted). See also, *Maine Cmty Health Options v. United States*, 140 S.Ct. 1308, 1323 (2020), and cases cited therein. The Charging Party provides no reasonable explanation as to why this well-settled cannon of statutory construction should be disregarded here.

The Supreme Court has recently (and repeatedly) confirmed the “general rule” that the President has the “authority to remove those who assist him in carrying out his duties.” *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183, 2198 (2020) (internal quotations and citation omitted). The Charging Party seems to argue that the President cannot remove Mr. Robb because he is not “a purely executive officer acting at the behest of the President” all the while simultaneously complaining about the “unabashedly political” nature of this matter. (CP Opposition, contrast pages 1 to 14). It is impossible to square those two contentions. Moreover, despite the Charging Party’s lengthy protestations and circuitous arguments, as above, the statute is clear that President Biden had the authority to remove the General Counsel.

The Charging Party relies on *Humphrey’s Executor*, 295 U.S. 602 (1935), to try to support its convoluted argument that President Biden did not have the power to remove Mr. Robb. This argument is entirely without merit. *Humphrey’s Executor* describes the general rule that the President possesses the authority to remove those who assist him in carrying out his duties. 295 U.S. at 632. There is an exception for “multimember expert agencies” and another

exception for “inferior officers with limited duties and no policymaking or administrative authority.” *Seila Law LLC*, *supra*, 140 S.Ct. at 2199-2200 (citing *Humphries Executor*, *supra*, and *Morrison v. Olson*, 487 U.S. 654 (1988)). However, neither of these exceptions applies here. *Humphrey’s Executor* permitted Congress to give removal protections for certain bodies of experts such as members of the Board. It does not apply to a position like the General Counsel. The second exception investigates good-cause tenure protections for certain “inferior officers.” Even if the General Counsel were such an “inferior officer,” that position has not be granted tenure protection in Section 3(d) and so that analysis is simply not relevant here. *Seila Law LLC*, *supra*, 140 S.Ct. at 2199-2200 (and cases cited therein).

The Charging Party’s argument can also be answered without consideration of whether President Biden’s removal of Mr. Robb was proper or not because it is beyond dispute that the President possesses the authority to fill a vacancy in the office of the General Counsel. The fact is, Mr. Robb vacated the office of the General Counsel. Nobody denies this fact—not the Board,¹ not Mr. Robb who has not contested the decision, and not the Charging Party in its brief. (See CP Opposition at page 1.) Based on the fact of this vacancy, President Biden was clearly authorized to appoint an Acting General Counsel under Section 3(d) of the NLRA which states that: “[i]n the case of vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy.” 29 U.S.C. §153(d). President Biden exercised that authority on January 25, 2021, by designating Mr. Ohr as Acting General Counsel.² Even if one were able to contest the President’s authority to dismiss Mr. Robb (which authority is not legitimately questionable), there is no question that President Biden was authorized to appoint Mr. Ohr to the vacant office of the General Counsel.

¹ <https://www.nlr.gov/about-nlr/who-we-are/general-counsel/general-counsels-1935>

² <https://www.nlr.gov/news-outreach/news-story/peter-sung-ohr-named-acting-general-counsel>

III. CONCLUSION

For the foregoing reasons, the Union respectfully submits that the General Counsel's Motion be granted.

Respectfully submitted,

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Dated: February 25, 2021

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of *Respondent IBEW Local 98's Response To Charging Party's Opposition To Motion Of The Acting General Counsel To The National Labor Relations Board To Remand The Complaint To The Regional Director For Dismissal Or, Alternatively, To Dismiss The Complaint* was electronically filed and served on the following via email.

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